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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 729

THE TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

versus

RED RIVER COTTON OIL COMPANY, ET AL.,
Respondents.

BRIEF FILED ON BEHALF OF RESPONDENTS IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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INDEX.

	Pages
Statement of the Case	1-3
Jurisdiction	3-4
The Issues Involved	4-5
Argument and Discussion of Authorities	5-18
List of Authorities Cited and Relied Upon:	
Anderson-Clayton v. Yazoo & M. V. R. Co., 174 La. 726, 141 So. 453	17
Civil Code, 2457	17
Dejean v. Louisiana Western Railway Company, 167 La. 111	17
Lehman-Stern & Co. v. Morgain's L. & T. RR & SS Co., 115 La. 1, 38 So. 873	17
Michigan Central R. R. v. Owen & Co., 256 U. S. 427, 65 L. Ed. 1032	5 et seq.
Noel Bros. v. Texas & Pacific Railway Co., 16 La. App. 622	17
Rivera v. Texas & N. O. Railway Company, 31 So. (2) 180	16

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STATEMENT OF THE CASE.

This suit was filed against the Texas & Pacific Railway Company to recover the sum of $31,573.08, the value of four cars of copra destroyed by fire on February 10, 1947.

The shipment of copra, of which these four cars were a part, originated in the Philippine Islands, moved from there by steamship to New Orleans, La., and by de-

fendant railroad from New Orleans to Alexandria, La., under four bills of lading, which are attached to the petition. (Exhibit A, Record, pages 10A-10B).

Plaintiffs allege that on Sunday, February 9, 1947, about 9:30 A. M., the cars were placed or spotted by the defendant on a spur track adjacent to the oil mill; that due to the fact that Sunday was a holiday for the mill's operating and unloading crews, it was impossible for it to open the cars, inspect the contents, and unload them before the next working day. It is alleged that at 3:50 A. M., Monday, February 10th, before the seals on the cars had been broken, and before the free time for unloading had elapsed, the four cars of copra were destroyed by a fire which originated on the oil mill premises from some unknown cause.

The four cars which were burned in the fire contained 132.66 tons of copra valued in Alexandria at $238.00 per ton, or a total of $31,573.08, the amount for which suit was filed.

Plaintiffs' cause of action arises under the contract of transportation, that is, the bill of lading which provides, in effect, that if goods, entrusted to the care of a railroad, are destroyed other than by an Act of God, etc., before the free time for unloading has expired, the carrier is liable for their value as at common law.

Applying this rule to the case at bar, we alleged that because the four cars of copra were destroyed by a fire of unknown origin, after the cars had been spotted on a spur track adjacent to the plant of the oil mill, but before the free time for unloading had expired, the railroad is liable

as an insurer, for the full value of the copra entrusted to its care.

The railroad's main defense, as set out in its answer, is that the four cars of copra had been delivered, thus ending its liability as a carrier, or otherwise.

The trial judge held that plaintiffs were entitled to recover the amount claimed. He rendered a written opinion giving reasons for his judgment. (Record, pg. 11).

The Supreme Court of Louisiana affirmed this judgment, (Record, pg. 21), and later denied an application for a rehearing. It rendered a short per curiam in which it briefly, but clearly, restated the reasons for its judgment. (Record, pg. 32).

The defendant, petitioner herein, has applied to this court for a writ of certiorari to the Supreme Court of the State of Louisiana. The purpose of this brief is to oppose the application.

JURISDICTION.

We do not contend that this court may not grant petitioner's application. We concede that you may, but, at the same time urge that this is not a case in which you should grant this extraordinary writ.

At this point we quote from your rules as follows:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither

controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." (Rule 38).

The federal question presented in this case has been determined by this court. (*Michigan Central Railroad Co. v. Owen & Co.*, 256 U. S. 427, 65 L. Ed. 1032).

The Supreme Court of the State of Louisiana followed this decision. It cited the case in support of its judgment. (See original opinion, Record, pg. 21, and *per curiam*, Record, pg. 32).

In view of the fact that the Supreme Court of Louisiana based its decision upon a prior decision of this court, following it in letter and in spirit, we urge that this is not a proper case for the granting of a writ of certiorari.

THE QUESTION PRESENTED.

The sole and only question presented in this case is a determination of the liability of a common carrier, under a bill of lading, for goods in a car which had been spotted on a spur track, but which were destroyed by fire of unknown origin before unloading had begun, and before the expiration of the free time for unloading.

This was the sole and only question presented in the *Michigan Central-Owen* case, *supra*, in which this court

held the railroad's liability to be that of a carrier at common law. The rule there announced is decisive, we submit, of the issue now before you.

THE MICHIGAN CENTRAL-OWEN CASE.

We now come to a discussion of the all-important *Michigan Central* case which, we submit, is decisive of the issue here presented. In that case, plaintiff sought to recover the value of a part of a shipment of grapes which was destroyed by fire while still in the railroad car after arrival at its destination. The railroad had spotted the car on a public delivery track for unloading, and had given notice of its arrival, and consignee had accepted the car, had broken the seals and began unloading the grapes. The fire occurred after the car had been practically unloaded, but before the expiration of the 48 hours free time provided in the bill of lading.

The court's statement of the facts, of the issue presented to it, and its quotation from the bill of lading are as follows:

> "Upon arrival of each car it was placed on a public delivery track of the railroad company and notice thereof given. Respondent accepted each car, breaking the seals thereof. And it is stipulated that at the time respondent started to unload, each of the cars contained the number of baskets and pounds of grapes received for transportation. The loss, whatever there was, occurred after the acceptance of the cars and their unloading had commenced, and whether the railroad company is liable therefor, and in what capacity liable,—whether as

carrier or warehouseman, or at all,—is the question in the case.

"The answer depends upon the construction to be given to the first paragraph of section 5 of the bill of lading. It is as follows:

" 'Property not removed by the party entitled to receive it, within forty-eight hours exclusive of legal holidays, after notice of its arrival has been duly sent or given, may be kept in car, depot, or place of delivery of the carrier subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at owner's risk and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage'."

The court then stated that the difference between plaintiff and defendant was the relation of the carrier to the shipment within the 48 hours after notice of its arrival had been given, and before the expiration of that 48 hour period. The contentions made by the parties according to the opinion were as follows:

"That of respondent is that the railroad company, during the forty-eight hours, is responsible as a carrier, this relation not terminating until the expiration of that time. The contention of the railroad company is contra, and that it, the company, is neither liable as a carrier or warehouse-

man. Not as a carrier, because the shipment had been delivered and accepted; not as warehouseman, because no negligence has been proved against it."

Your Honors will note that the position taken by the defendant in the *Michigan Central* case is just exactly that contended for by the defendant now before you. The Texas & Pacific Railroad Company contends here that it is not liable as a carrier, because the shipment had been delivered and accepted and that, as a carrier, it had done all that it was required to do according to usage and custom, and that it had complied with all of its obligations and duties as a carrier.

The Supreme Court of the United States made very short work of the legal theory advanced by the defendant carrier, stating in no uncertain terms that during the free time accorded the plaintiff for unloading, the responsibility of the railroad under the bill of lading was that of a carrier as at common law. The pertinent portion of the opinion is as follows:

"By referring to section 5 of the bill of lading, it will be seen that it supposes a contingency and provides for its occurrence. It supposes that property may not be removed when it has reached destination, and is available for delivery, and two periods of time are provided for. One of forty-eight hours after notice of the arrival of the property has been sent or given. During this time there is no declaration of the relation of the railroad company to the property. The other period commenced at the expiration of the first or forty-eight

hour period, during which the provision is that the property is subject 'to carrier's responsibility as warehouseman only.' The comparison has its significance and must be accounted for. Realizing this, the railroad company makes a distinction. Its contention is that where delivery has been made of the property, as, it insists, was true in the case at bar, the responsibility of the railroad company as carrier immediately ceases. If, however, it is neither delivered nor removed within forty-eight hours after notice of its arrival, the responsibility of the railroad company thereafter is that of 'warehouseman only'.

"The answer puts too much emphasis upon the distinction between property removed and property delivered. The property here was not delivered; access was only given to it that it might be removed, and forty-eight hours were given for the purpose. Pending that time it was within the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation."

"The bill of lading is definite, as we have pointed out, in its provisions and of the time at which responsibility of the company shall be that of warehouseman, and, by necessary implication, therefore, until that responsibility attaches, that of carrier exists."

It is obvious that the case at bar is much stronger for plaintiffs than the *Michigan Central* case. In our

case, the cars were spotted on a spur track on Sunday when our plant was not operating, and so the seals on the cars had never been broken when the fire occurred. In the *Michigan Central* case, the car had been accepted and had been partially unloaded before the remaining grapes were destroyed by fire. Despite all of this, the Supreme Court of the United States held that so long as the 48 hours free time for unloading had not elapsed, the railroad was liable as a carrier, and not as a warehouseman.

We earnestly submit to Your Honors that the rule of law laid down in this case back in 1921, is still the law of the land and that it is applicable to the case before you. The four cars of copra had been placed on a spur track adjacent to plaintiff's plant, but no attempt had been made to unload them, and the 72 hours free time afforded the oil mill for unloading had not elapsed.

We may say in passing that in our case, plaintiff alleged, and defendant admitted, that the free time for unloading fixed in the tariffs was 72 hours (Pet. and Ans., Par. 7). So, of course, the copra was destroyed before the expiration of the free time, and at a time when the responsibility of the railroad was that of a carrier as at common law, or, practically that of an insurer.

While arguing the exception of no right or cause of action in the lower court, counsel for the railroad attempted to differentiate the *Michigan Central* case simply by saying that the bills of lading in the two cases were different. So that the court may see how remarkably similar the bills of lading really are, and particularly that portion of the bill of lading in the *Michigan Central* case

quoted in the opinion, and which the court used as the basis of its decision fixing the liability of the railroad as a carrier, we quote side by side the first paragraph of Sec. 5 of the bill in the *Michigan Central* case, and the first paragraph of Sec. 4 of one of the bills of lading in our case:

Paragraph (a) of Sec. 5 of the Bill of Lading in the *Michigan Central* case:	Paragraph (a) of Sec. 4 of the Bill of Lading in the case at bar:
"Property not removed by the party entitled to receive it, within forty-eight hours exclusive of legal holidays, after notice of its arrival has been duly sent or given, may be kept in car, depot, or place of delivery of the carrier subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only."	"Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman only."

One can readily see that there is no real difference between Par. (a) of Sec. 4 of the bills of lading in evidence in the case at bar (Plaintiffs' 4, Record, pg. 10A-B), and Par. (a) of Sec. 5 of the bill of lading under which the Supreme Court of the United States held the Michigan Central Railroad Company liable for the value of the grapes which were destroyed by fire that occurred after delivery of the car, but within the 48 hours free time allowed in the bills of lading.

The free time in our case (72 hours) is not fixed in the bill itself, but by tariffs, to which reference is made in the paragraph of the bills of lading above quoted. That, if it please the Court, is the sole difference in the two bills of lading.

Your Honors will quite readily appreciate the purpose and import of the provision in the bills of lading which we have just quoted. It is obvious that it limits the liability of the railroad after the expiration of the free time to that of a warehouseman, something considerably less than the liability of a carrier at common law. Therefore, as the Supreme Court so aptly said in the *Michigan Central* case, liability as a warehouseman does not begin until the expiration of the free time, so necessarily until then, liability as a carrier continues.

The decision in the *Michigan Central* case, we submit, is a complete answer to the defense of "delivery" urged by the Texas & Pacific Railway Company. It is made plain in the majority opinion that responsibility and liability as a carrier as at common law, continues until the expiration of the free time for unloading.

In our case the proof is that, before the expiration of the free time, and while the Texas & Pacific's liability was that of a carrier as at common law, that is, substantially that of an insurer, the four cars of copra were destroyed by fire of unknown origin and cause. Clearly then, we submit, the railroad is liable to plaintiffs for the value of the copra so destroyed.

The so-called "delivery" defense, urged by our opponent, seems to have been taken bodily from the dissenting opinion of Mr. Justice McReynolds in the *Michigan Central* case from which we have quoted. The judge, alone of the nine members of the court, took the position that the railroad was no longer liable, either as a carrier or as a warehouseman, because the carload of grapes:

> "* * * was opened, examined, accepted and apparently thereafter remained in charge of the consignee."

The other members of the court held, however, in no uncertain terms, that despite the fact that the car had been opened and examined and accepted, and despite the fact that the car had been almost entirely unloaded, the railroad was liable as a common carrier for the value of the grapes that remained in the car, because the free time for unloading them had not expired.

We rely upon the majority opinion. The facts in the two cases are almost identical, and the rule of law laid down in one is certainly applicable to the other. We say

that the case amply supports our contention that the defendant in this case is liable as a carrier under the common law, and must pay the value of the copra destroyed by fire.

Counsel argues that the transportation had been completed, that the Texas & Pacific had done everything with the shipment that it had to do, or could do, and that, therefore, it could not be liable for the value of the goods. Counsel fails to appreciate the true relationship between a carrier and a shipper or receiver of goods under the terms of the bill of lading.

The answer to the contention is that the oil mill still had something to do with the copra. To make any use of it, it had to unload it and, as part of the contract of transportation for which it paid a rate, or a premium, if you will, it had seventy-two hours free time to unload the copra. During this free time the railroad was liable to it for the value of the copra as a carrier at common law, thereafter as a warehouseman. So long as the oil mill had something to do with respect to the copra there could be, and was, a responsibility on the part of the defendant. Its responsibility was divided into two kinds. For the first seventy-two hours it was liable as a carrier, and thereafter it was liable as a warehouseman. The bill of lading clearly so provides, and the Supreme Court of the United States so construed a bill of lading that is substantially identical.

May we remind the court that in the case of the grapes, Michigan Central Railroad Co., so far as it was

concerned, had nothing more to do with them. It had spotted the car, the consignee had opened it and accepted the grapes, and had substantially unloaded them. The railroad was entirely through with them. It had nothing whatever further to do. The grapes were in the hands of the consignee, and he was unloading them. The crux of the matter, however, was that the 48 hour free time for unloading hadn't expired, and during that period the grapes were still at the risk of the railroad, and when they were lost the Supreme Court of the United States held them liable for their value. The same rule of law applies with equal force to copra.

Counsel seeks to distinguish our case from the *Michigan Central* one by saying that the grapes had not been delivered, but had remained in the custody of the railroad, while here the copra had been delivered and was in our hands. We feel that he has entirely misconstrued the *Michigan Central* case.

The opinion clearly shows that after the arrival of the cars they were placed on a delivery track of the railroad company, the cars were opened, the grapes were examined, accepted and largely removed. Certainly, all of this amounts to more of a delivery than could be contended for in the case of the copra, which had merely been spotted on a spur track awaiting unloading.

Besides, as Judge McKenna so aptly stated in the majority opinion, the railroad company there, and here,

places too much importance upon the word "delivery". Placing a car on a spur track for unloading is not delivery in the sense that the carrier may no longer be liable for its contents. To absolve a carrier from liability not only must a car be spotted, but the free time for unloading it must also elapse before the railroad's liability is other than that of a carrier at common law.

Authority for our last statement is to be found in the majority opinion in the *Michigan Central* case which we are discussing, in which the organ of the court observed:

> "The answer puts too much emphasis upon the distinction between property removed and property delivered. The property here had not been delivered; access was only given to it that it might be removed and forty-eight hours were given for the purpose. Pending that time, it was in the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation."

That observation of the factual situation, and legal relationship of the carrier is exactly what we have here. As with the grapes, the copra had not been delivered; it had been placed upon a railroad spur track adjacent to the oil mill's plant in order that it might be unloaded. The free time for unloading had not expired, and until it had, the copra was still the responsibility of the railroad com-

pany, and its relation to the copra was that of a carrier at common law.

The Supreme Court of Louisiana found as a matter of fact that the copra had not been delivered by the carrier to the consignee, but, on the contrary, the cars had merely been placed or spotted for delivery. (See per curiam, Record, pg. 32).

In this per curiam the Supreme Court so aptly stated the whole issue that we cannot refrain from quoting as follows:

> "It is conclusive to us that under this bill of lading, as long as the copra remained in the cars of the railroad, the railroad was to be either a carrier or a warehouseman to the consignee, and, since the free time had not elapsed, it was a carrier under the provisions of the bill of lading. We adhere to our original opinion that the Michigan Central case is controlling here."

The jurisprudence of the State of Louisiana for a period of many years has been in harmony with the rule announced by this court in the *Michigan Central* case. The Supreme Court of Louisiana could have cited decisions of its own in support of its judgment. Though probably not too important at this time, we refer your Honors to some of these decisions:

Rivera v. Texas & N. O. Railway Company, 31 So. (2) 180;

Anderson-Clayton v. Yazoo & M. V. R. Co., 174 La. 762, 141 So. 453;
Noel Bros. v. Texas & Pacific Railway Co., 16 La. App. 622;
DeJean v. Louisiana Western Railway Company, 167 La. 111;
Civil Code, Art. 2457;
Lehman & Stern Co. v. Morgan's L. & T. R. R. & S. S. Co., 115 La. 1, 38 So. 873.

In support of its theory that the four cars of copra had been completely delivered and that it was no longer liable, either as a carrier or as a warehouseman, the defendant cited in the Supreme Court of Louisiana, and in the District Court as well, some cases selected from the different states. We do not wish to discuss them here except to say that in the main they are very old decisions, decided long before the passage of the Carmack Act in 1906, or the amendments to the act.

In the other cases that arose later there was no showing of the provisions of the bill of lading which, of course, fixes and determines the relative rights and obligations of the consignee and of the carrier.

For the moment we think it sufficient to say that the Supreme Court of the State of Louisiana refused to be bound by any of these decisions, but, quite properly, followed the decision of this court in the *Michigan Central* case, in which the facts were largely the same, the bills of lading almost identical, and which, in all respects, was decisive of the issue presented to it.

We respectfully submit to the court that the decision of the Supreme Court of Louisiana correctly construed and followed the decision of this court, and that, therefore, petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

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